COLUMBIA
LAW REVIEW

VOL. XXII DECEMBER, 1922 NO. 8

THE MEANING OF LEGAL HISTORY

PREFACE

It is my sad duty to introduce on this occasion to the readers of the Columbia Law Review the thoughts of one whom they have known well and esteemed highly and who has been taken from their midst by a decree of blind Fate. My warrant for writing these few lines consists in the fact that Barbour was a pupil of mine, my best pupil, on whom I looked as the man of greatest ability and promise among the younger generation of Anglo-American jurists. The text handed over to me by Mrs. Barbour, a dear friend of our family in Oxford, represents the first of the lectures on legal history delivered by her late husband under the Carpentier foundation to the Columbia University of New York. He had given four of these lectures, when the fatal illness overtook him, and there are notes of the other three as well as schemes for the rest of the course, but these materials are in too fragmentary a state to be put before the public. It is a great pity because one catches interesting glimpses of the work in process of formation, but the publication of unfinished sketches would certainly not have been approved by him who was scrupulously careful in every detail and as remarkable by the high finish of his work as by its originality.

The first lecture, however, is sufficiently complete and elaborated to appear in a review, although the author undoubtedly developed many points in the course of his speech to a students' audience. Even as it stands, this introduction on the value and meaning of legal history is worthy of the closest attention. It brings home with great force the truth that it is only in its historical evolution that English law comes to its full right. This may be said of any system of law but it is especially true of English law. It is not the apparent incongruities and archaisms of the law of real property, for instance, which supply the key to its interpretation, but its development, conditioned by historical causes. Nor is the case different as regards criminal law, or contracts, or family law.

Barbour was one of those best qualified to speak on the subject; he combined in a rare degree the precise dialectical skill of the lawyer with the investigating spirit of the historian.

PAUL VINOGRADOFF

OXFORD, ENGLAND

LECTURE NOTES OF THE LATE PROFESSOR WILLARD BARBOUR[1]

The present time is critical—intense and restless activity—re-examination of old concepts—the insistent suggestion that they cannot continue without recasting. Indeed there are those who suggest a more drastic process. Let me take an example. "Ideals of America" (prepared for City Club of Chicago).

"An era ended in July, 1914. A civilization reached its conclusion. We are now far enough away to see its affairs in perspective. Nineteen hundred and fourteen is detached from the present. The year so recent has begun to take its place with 1896, 1861, and even with 1775. This almost immediate past is already becoming as alien to us as are the epochs we learned through the written chronicles of the past. What is ahead we cannot say with assuredness although the rude outlines of the future are visible now to the clear-eyed as objects perceived in the semi-light of approaching dawn." (Review: 2:56, Jan. 17, 1920).

This is unfortunately typical. Cf. the "New World" of the Atlantic. We have here the easy assumption that everything is different—must be different since the war.

This assumption is predicated upon a strange view of history: not that there is not change, ceaseless change if you will. But the things that we often treat today as a simple matter of course have been the result of a long and difficult struggle. What has been fought for and won with difficulty is not lightly abandoned; though we may have forgotten the struggle, its marks are with us yet. And so it may not be *mal apropos* at such a time as this to turn back,—to spend a little time (and it will be very little) in an inquiry into the way in which some things we talk about with indifferent familiarity came to be what they are.

These are mere generalities. I am to speak of law and legal history. But what I would have you notice is that our law has not escaped the challenge of those who question our institutions. It could not be otherwise. Knit as it is into the fabric of our lives, part and parcel of our political institutions, it must stand or fall with them. Of course criticism is nothing new; it had begun before the war. The sociological school of jurisprudence. A word about it. I believe it has something to contribute to our thinking about law, the common law, though one may nourish a healthy doubt as to whether it can accomplish what its most esthusiastic proponents have claimed. Very likely in the past we have given insufficient attention to economic and social forces. A situation, technically, *legally* correct, may fail to satisfy legitimate social demands. Note that the sociologist inevitably is driven into *history*. It may indeed be that the work which

[1] The COLUMBIA LAW REVIEW publishes these fragmentary notes as they were left by their author. Only such changes have been made in punctuation and in the form of citations, as seemed necessary for clarity. The editors of the REVIEW have wished thus to preserve to the reader, as far as may be, the vigor and charm of style with which the author so delighted them.

now needs to be done is somewhat parallel to the work of chancery in the fifteenth and sixteenth centuries. *Cf.* the bond paid but no "acquittance". Technically correct, ethically wrong. Yet supported tenaciously by the replication of the sergeant. Today, says Pound, we must have more regard for the social aspects of a situation technically, legally correct.

Take for example Ehrlich, *Grundlegung einer Soziologie des Rechts* (see analysis by Vinogradoff in [1920] 29 Yale Law Journ. 312).

Law applied by the courts is insufficient to explain the juristic relations of society. Jural relations are wider. Take family settlement—many never in litigation—*conventions,* usage, establish a thing—it may at length be accepted by the law, *e. g.,* tenancy by the curtesy— probably not of legislative or judicial origin—rather does it grow out of the preponderance of the husband in the mediaeval household—hence incapacity of the wife. Curiously enough this drives a writer like Ehrlich back into history—only he will not do the patient investigation necessary—he will work *a priori.*

But this merely goes to show the desirability of a broader background for generalization—I know not how that is to be obtained if not (in part) through historical investigation.

One alleged danger, emphasized by the zealous defenders of the common law, we may somewhat summarily dismiss. See Fowler, *The New Philosophies of Law* (1914) 27 Harvard Law Rev. 718, and Pound's reply. It has been said that the most serious matter about the modern movements in jurisprudence is that they come from and represent an alien legal system or an alien philosophy; dire fear of foreign juristic thinking. This must bring a slight smile to anyone who remembers the history of our law. The common law is a tough beast; it has not shrunk from the contest with other systems in the past. Rather has it welcomed such. The conflicts of the thirteenth and fifteenth centuries. *Cf.* Story, *Equity Jurisprudence.* Very brief details. Roman law and canon law. Bracton did not scruple to use Azo: to adopt as his scheme of thinking the broad outlines of Roman jurisprudence. But the law he set forth was English law. So, too, Spence could use Savigny and yet present English equity. (True he exaggerated the Roman elements.)

The common law goes on, showing a vast and bewildering capacity for expansion and enlargement. Like the English language which continually enriches itself by piratical excursions into other speech. Thus is our law a strange composite: Germanic elements in it—*e. g.,* concept of seisin; Roman law of sorts taken with the Normans in the Conquest; canon law and Roman law through equity; the customs of the market place, of the borough, of the manor. Nothing too humble to be turned to use. Should this marked capacity to expand, to enrich itself through the experience of other systems,—should this cease, we should have good cause to fear for the future of our law. (One of most interesting studies is in history of *conflict.*)

I have said that the common law manages somehow to emerge triumphant from contests with other systems. This is doubtless a commonplace and scarcely needs illustration. But it is not very long ago that a great English historian predicted an inglorious future for the common law in the United States. Speaking of Mr. Livingston's work in producing the Code of Louisiana which he calls, "of all republications of Roman law the one which appears to us the clearest, the fullest, the most philosophical, the best adapted to the exigencies of modern society," he continued:

"Now it is this code, and not the Common Law of England, which the newest American States are taking for the substratum of their laws. The diffusion of the Code of Louisiana does, in fact, exactly keep step with the extension of the territory of the Federation. And, moreover, it is producing sensible effects in the older American States. But for its success and popularity, we should not probably have had the advantage of watching the greatest experiment which has ever been tried on English jurisprudence—the still-proceeding codification and consolidation of the entire law of New York."

"The Roman law is, therefore, fast becoming the *lingua franca* of universal jurisprudence. . . . "

Thus wrote Sir Henry Maine in 1871. (Originally published 1856; Reprinted, *Village Communities: Roman Law and Legal Education.* Quoted from page 360-1.)

The passage of events has written its ironical commentary on this prophecy. The significance of the failure. There has been no reception of Roman law in the United States. In fact Sir Henry Maine did not lay his finger upon the most critical period,—post-revolution days. The prejudice against things English—the enthusiasm for French ideas . . . (Here a brief reference to Stone's project: study on American legal history.)

But, you may say, what has this to do with our present task? Are we not forgetting legal history? No. One of the topics I shall propose for your consideration is the contest between Roman law and common law,—in England and America. Remember that there is only one other legal system that bears comparison with the law of Rome. For, while on the continent the barbarians conquer peoples, they themselves succumb to Roman law; it becomes the substratum of their legal system. Not so in England; the English work out a system that is thoroughly their own. However much this may sound a truism today, it deserves careful thought. It is so natural to us that we are likely to overlook its significance.

More than that. A system of law which has played a large part in the life of a nation deserves study for itself alone. Peculiarly is the common law an expression most characteristic of the English-speaking peoples. I need not labour this point for it has been very finely developed by Sir Frederick Pollock, *The History of English law as a Branch of politics* in

Essays in Jurisprudence and Ethics (1882) 198. Not only the lawyer in the courts,—nor the judges,—but the lawyer in parliament as well. Note the peculiar legal cast of the Petition of Right and the Bill of Rights. Recall the work of Sir Edward Coke, of John Selden.

This country. Beginnings of our constitution lie far back, but it is largely the work of law and lawyers. Jefferson, *whether Christianity is a part of the Common Law?* (Appendix to Jefferson's reports.) Hamilton: y. B. B.—use of—

But this relates to political and constitutional history. Can we come a little nearer home? Is legal history merely a pleasant avocation to us as lawyers? Something that is perhaps desirable, but a mere frill? Can it help us to understand modern law? Yes, I think so.

To begin with it may make us less desirous of preserving things as they are, just because they are so. Perhaps no class is more in danger of becoming slave to tradition than the lawyer. But *laissez faire* finds slight historical justification. Let me illustrate what I mean. In the reign of Henry VI, Fortescue, *C. J.* (an able judge certainly), was pressed by counsel as to the absurdity of a distinction he was laying down with regard to a writ of *scire facias*. He answered simply: "The law is as I have put it, and so it has always been from the beginning. We have several set forms which are always held legal, and they have been so held and used for a reason, though it may be that the reason is now forgotten." (1458) y B 36 Hen. VI pp. 25, 26 pl. 21. That is the trouble: there are too many things in our law today religiously preserved; sometime there may have been a reason, but "the reason is now forgotten." And the point of view of Fortescue is a common point of view in the courts. The preservation of many hoary antiquities in the law of real property is an example that readily occurs to us. Refer to Maitland, *The Law of Real Property,* 1 Collected Papers (1911) 162. Illustrations there.

Or take a very technical rule: that with regard to trespass *ab initio.* (Rule of substantive law—or evidence? How did it begin? If you wish to see how that can be handled by an able judge possessing real historical insight, read *Commonwealth* v. *Rubin* (1896) 165 Mass. 453 (opinion by Holmes). The same thing is true in much that you will read in the reports about the forms of action. They are by many supposed to be immutable. . . .

Now today it is certainly shameful if we can give no better reason for a rule than that it was so laid down in the middle ages; or if we proceed to say that there was sometime a reason but it is forgotten. Not only is the reason forgotten—it has ceased to exist! And this becomes downright ludicrous when the basis of the rule no longer exists. But before we set about altering any rules or even challenging them it is well to inquire how they came to be. If we find that the reason is no longer of force, we must find a present reason or the rule had better be abandoned. History may teach us to have less respect for something we have too readily

accepted. At the same time it may warn us of the futility of sudden radical changes. We may preserve what Justice Holmes has called an "enlightened skepticism": toward the mere relics of the past; toward the sudden changes suggested for the future.

In another way has the historical method importance. We lay much stress in our law schools upon accurate analysis. This I should be the last to decry. The law needs to be systematized and perhaps for this purpose no better method than the deductive can be used. But the terms we use, our fundamental notions, are coloured by a long past. *Cf.* von Ihering:

"Law is not less a product of history than handicraft, naval construction, technical skill: as Nature did not provide Adam's soul with a ready-made conception of a kettle, of a ship, or of a steamer, even so she has not presented him with property, marriage, binding contracts, the State. And the same may be said of all moral rules. . . . The whole moral order is a product of history, or to put it more definitely, of the striving toward ends, of the untiring activity and work of human reason tending to satisfy wants and to provide against difficulties."

When we talk of "contract," "property," etc., we may too easily assume that these concepts are as old as the law itself. History, however, shows us that our modern notion of property is the consequence of a long evolution; a unification of very diverse elements brought together in one generalization. The generalization is useful, but the component parts can not be ignored even today. So too in contract. It may be said that Roman law in its classic period scarcely knew a *general law* of contract: rather principles of particular contracts. How meager was our own law of contract in the middle ages is familiar to all. To generalize about contract now on an analytical basis without due consideration of its history is hazardous. *Cf.* the detriment idea in consideraton and the effort to find a reasonable ground for supporting it.

Let me take one or two specific examples. Draw them from Langdell, one of the acutest writers. *Brief Survey of Equity Jurisdiction* (1904) 126. Discussing creditor's bills:

"During the life of a debtor, the only remedy of which his creditor as such can avail himself is against the person of the debtor . . . When, therefore, the debtor dies, the creditor's remedy is gone. The debtor's property, to be sure, remains, but the creditor cannot touch it unless the law furnishes him with a new remedy. Indeed, when a debtor dies, his debts would all die with him did not positive law interpose to keep them alive; for every debt is created by means of an obligation imposed upon the debtor, and it is impossible that an obligation should continue to exist after the obligor has ceased to exist."

This, he seems to indicate, "is as old as the law itself." The law *interposes* to keep the debt alive. "It is *impossible* that an obligation

should continue to exist after the obligor has ceased to exist." Why impossible? Notice the implication that "the law is a logical system in which it is for ever impossible for a debt to survive the debtor" (Cohen). But if so, how could positive law bring about the impossible? (Cohen). Notice the logical explanation of the fact that the obligation does not survive death. A debt is created by an obligation imposed on a debtor. Assume that this is personal to the debtor. With the death of the debtor the obligation ceases to exist. Very simple. But what are the facts? It was not true that all obligations perished with the obligor. This is all bound up with the history of debt. If the obligation arose from a sealed instrument, it survived; if from "parol contract" it died. Reason: action to enforce was debt. Debt lay against the executors of the debtor, if a sealed instrument; it did not so lie otherwise. The contemporaneous explanation was that the debtor might have waged his law, and the executors could not do this for him. 4 *Oxf. Stud.* 40; Y. B. (1343-4) 17 & 18 Edw. III (R. S.) 513. That is all there is to it, and when one comes to study the history of the action, the logical deduction assumes a questionable value. (Perhaps this is not quite fair to Langdell for he does go into the history of the thing; but he will make his general statement.)

Another illustration: Langdell's use of the maxim: *aequitas agit in personam.* This leads to the treatment of equity as a purely remedial system: no rights created. Now equity in the beginning undoubtedly did confine its action to the persons of the parties and did not act on the *res.* This was a weakness. It was dictated by the situation at the time. Amplify . . . But Langdell:

"Anyone who wishes to understand the English system of equity *as it is and as it has been from the beginning,* must study its weakness as well as its strength."

This seems to me to ignore the whole history of the matter. It assumes that there is some necessary connection between the remedies of chancery and this mode of enforcement *in personam.* It justifies the connection logically, and then proceeds to draw deductions therefrom. It treats equity as a hard and fast system unchanging and incapable of change. This attitude seems to me stultifying. Note one unfortunate result. A decree from this point of view would not determine any right or obligation: no legal effect. Hence Mr. Beale applies the doctrine in the conflict of laws: an equitable decree cannot be the foundation of a suit in another jurisdiction. True the courts have so recognized decrees for money; this is awkward but it can, with defiance of history, be explained away. But the old argument may be applied to a decree ordering the conveyance of land. The original cause of action survives! Even Dean Pound gives his assent to this heresy in the last number of the Harvard Law Review (Jan. 1920).

Another danger in the purely logical method: Logic all too easily

degenerates into scholasticism. Never was the law more logical than in its period of greatest stagnation. Open a Year Book of say Henry IV or of Edward IV. You will find as keen reasoning, as neat and nice distinctions as a highly trained mind working in a subject that has become highly technical can produce. We can but admire the mental ingenuity of the lawyer of the Middle Age. But the result was utterly disastrous. No one can read page after page of those reports without wishing that there had been less logic and a little more common sense. Law was getting out of touch with life. I say that in this there is an example and a warning. If the study of this period taught us only something that must at all costs be avoided, it would not be time spent in vain. The requirement of meticulous accuracy. *Cf.* verdict of guilty in the 'fist' degree—held of no effect—*Woolridge* v. *State* (1883) 13 Tex. App. 443 cited [by] Pound). The learned court:

"It is to be particularly noted that here we have no case of the misspelling of a word; the word used is *'fist,'* is properly spelt 'fist,' and is a word as well defined and as well known to the English language as any other word in daily common use."

Yet the clerk read it 'first' and the jury assented. It would be a libel on the middle ages to call this mediaeval. Misnomer in the 18th century: *Cf.* Holmes, *J.*, in *Paraiso* v. *United States* (1907) 207 U. S. 368, 372.

" . . . the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert."

What we may well ask of history then is not an uncritical accumulation of facts from the past: rather a combination of sound historical criticism and accurate juridical analysis. It is this combination, unfortunately too rare, which alone will yield results. Let us at least aim for that, however far short of the ideal our own performance may fall.

Justice Holmes, *Common Law* (1881) 2, calls attention to two errors equally to be avoided:

"One is that of supposing, because an idea seems very familiar and natural to us, that it has always been so. Many things which we take for granted have had to be laboriously fought out or thought out in past times. The other mistake is the opposite one of asking too much of history. We start with a man full grown. It may be assumed that the earliest barbarian whose practices are to be considered, had a good many of the same feelings and passions as ourselves."

The first I have already emphasized. Against the second we may use the effective method of going backward from the present as well as coming forward from the past. The first requisite to an intelligent study

of legal history is a thorough knowledge of modern law. It is desirable to know the end before we start searching for the beginning. This was never better expressed than by Maitland:

"We must not be in a hurry to get to the beginning of the long history of law. Very slowly we are making our way towards it. The history of law must be the history of ideas. It must represent, not merely what men have done and said, but what men have thought in bygone ages. The task of reconstructing ancient ideas is hazardous and can only be accomplished little by little. If we are in a hurry to get to the beginning we shall miss the path. Against many kinds of anachronism we now guard ourselves. We are careful of costume, of armour and architecture, of words and forms of speech. But it is far easier to be careful of these things than to prevent the intrusion of untimely ideas. In particular there lies a besetting danger for us in the barbarian's use of a language which is too good for his thought. Mistakes then are easy, and when committed they will be fatal and fundamental mistakes. If, for example, we introduce the *persona ficta* too soon, we shall be doing worse than if we armed Hengest and Horsa with machine guns or pictured the venerable Bede correcting proofs for the press; we shall have built upon a crumbling foundation. The most efficient method of protecting ourselves against such errors is that of reading our history backwards as well as forwards, of making sure of our middle ages before we talk about the 'archaic,' of accustoming our eyes to the twilight before we go out into the night."—*Domesday Book and Beyond* (1897) 356.

We shall have a deal to say about procedure. It may be well to enquire at the outset into its relation to substantive law. Even to-day the law is laid down adjectively, rather than substantively. That is "the remedy can be ascertained more readily and easily than the precise nature and extent of the right infringed." (Odgers). Concede that this is not ideal. Logically we ought to enquire first as to the right, and if right there be, give an appropriate remedy. We do not find this ideal realized; text-writers and law teachers are working in that direction, but the *law in action* is still concerned rather with the particular instance, than the general doctrine.

If this be true to-day we need not be surprised if it is the more marked the farther back that we go. Sir Henry Maine's remark: "substantive law has at first the look of being gradually secreted in the interstices of procedures." The logical process is inverted: you inquire (1) not what are my rights? If I have a right there must be a remedy; rather you ask (2) Have I a remedy? For one moment perhaps it was different. In the golden period of the common law Bracton could write: *"Tot erunt formulae brevinum quot sunt genera actionum,"* but the ink was scarcely dry on the parchment when this was no longer true. The law reverted to procedure and the test of rights was the existence of remedies.

This is but natural. Law makes its first impact on the mind through direct action; it is the phenomena of direct action that constitute the early

law. I need not weary you with illustrations of this. *Cf.* the Anglo-Saxon codes: the Salic law. Single instances: then the instances accumulate: finally there is an attempt at generalization. But the mediaeval point of view is essentially one of looking at the law through procedure. Take Bracton, whose work is well described as the flower of English Mediaeval jurisprudence. Bracton was in many ways ahead of his time. . . . He begins with generalities and a little of the law of persons. (Roman law influences here.) Then the law of things (*De acquirendo rerum dominio*) of which the larger part is devoted to *Donatio* (feoffment) where there is a deal about writs (*i. e.,* procedure.) This is less than a third of the book. The remainder deals (except for a bit about pleas of the crown) with *actions*: *e. g.,* the assize of novel disseisin is given ninety-eight folios: more space than is devoted to the law of things,—and this is only one action. The treatise ends with an incomplete account of the writ of right. Thus is the bulk of the book devoted to actions. Contrast with this a comparatively modern work, such as Kent's *Commentaries.* . . .

This space devoted to actions is then very marked in Bracton. But the predominance of actions is even greater in the subsequent writers. In the law tracts which abound in the fourteenth and fifteenth centuries, we shall find procedure treated to the exclusion of everything else, *e. g.,* Hengham. Thus we see something of the mediaeval point of view: the lawyer looked at the law entirely from the point of view of the law court. If he were to do his duty by his client he must be familiar with all the intricacies of procedure, and when we remember that each action has procedural peculiarities, the bulk of the law of this kind is appreciated. The reports (YBB) are written primarily for the pleader. And *cf.* Littleton's advice to his son in the preface to the *Tenures.* Thus without giving a deal of attention to procedure, the investigation of mediaeval law is a hopeless task, *e. g.,* if you want to look for the law of *contract,*—where do you find it? Under actions! *Cf.* FitzHerbert: *De natura brevium;* the abridgments and their classification. (Follow with analysis of relation to administrative law.)

This has had a profound effect in the formulation of our law: some instances:

In Real Property: There are not a few here; *e. g.,* the terms real and personal. Why is a term of years personal property? Explain that there was originally no real action for the recovery of the term by the termor. *Cf. Maitland, Forms of Action* (1910) 368. The concept of seisin: here an outgrowth of the evolution of the law through the possessory assizes, writ of right, writs of entry, trespass, etc. See further my statement (c): disseisor who severs during his possession acquires title to the thing severed.

In Contract: Many distinctions in contract turn on distinctions in actions; and the distinctions between debt, covenant and assumpsit are almost entirely historical. "Contract of record"; there is such a thing

because debt would lie upon a record and the old meaning of contract was something upon which debt would lie. Seal: covenant: consideration, the detriment idea. Due probably to the distortion of a tort action into one that would lie for breach of contract. *In Tort*: Holmes, *Path of the Law* (1897) 10 Harvard Law Rev. 457. How far is there any general theory of tortious liability? It seems not improbable that as the right of action for a particular class of wrong has its own history, the lack of harmony in principle may in part be explained.

Take one special question: We have one particular distinction that seems anomalous: rights the technical disturbance of which gives a cause of action, and rights which are infringed only when damage occurs, *e. g.*, easement of light. Originally the action was an assize of nuisance then action on the case for nuisance: see Lord Macnaghten's judgment in *Colls* v. *Home Stores* [1904] A. C. 179, 185. This case turned on the very distinction of which I have spoken: one of the most discussed cases of recent times.

Another aspect of the Forms: English law has developed a technique of its own: its law is essentially the creation of a great people. Now it came through a struggle. Somewhere von Ihering remarks that it must not be forgotten that peoples have had to struggle for their laws.

"The very fact that their law does not fall to the lot of nations without trouble, that they have had to struggle, to battle and to bleed for it, creates between nations and their laws the same intimate bond as is created between the mother and her child when, at her birth, she stakes her own life. A principle of law won without toil is on a level with the children brought by the stork: what the stork has brought, the fox or vulture can take away again. But from the mother who gave it birth, neither the fox nor the vulture can take the child away; and just as little can a people be deprived of the institutions they have had to labor and to bleed for, in order to obtain. We may even claim that the energy and love with which a people hold to and assert their laws, are determined by the amount of toil and effort which it cost them to obtain them. Not mere custom, but sacrifice forges the strongest bond between a people and their principles of legal right; and God does not make a gift of what it needs to the nation He wishes well, nor does He make the labor to its acquisition easy, but difficult. In this sense I do not hesitate to say: The struggle needed by laws to fight their way into existence is not a curse, but a blessing."

It is through the forms of action that we see the struggle of the English people for their law. The assize of novel disseisin was, Bracton tells us (f. 164b) the product of many wakeful nights (*multis vigiliis excogitatam et inventam*). The action is produced through struggle; there is further among the forms of action themselves a struggle: what Maitland has called the survival of the fittest. This means that the test of experience, of trial is being constantly applied. We can study our formulary system in all the steps of its evolution (impossible in Roman law). It is

not surprising that a thing the result of ceaseless effort and study should be jealously guarded by its practitioners. Herein is one reason for the toughness and tenacity of the common law. Bacon's *Reading on Uses* (you get this in Trusts) is in all conscience technical enough, but it pales before Littleton's *Tenures*. Yet the latter Coke could call "a work of as absolute perfection in its kind and as free from error, as any book that I have known to be written of any human learning." And hear Coke further:

"It is a desperate and dangerous matter for civilians and canonists (I speak what I know and not without just cause) to write either of the common laws of England which they profess not, or against them which they know not . . . their pages are so full of palpable errors and gross mistakings, as these new authors are out of charity to be pitied, and their books out of our judgment cast away unanswered. —Alas, our books of law seem to them to be dark and obscure; but no wise men will impute it to the laws, but to their ignorance, who by their sole and superficial reading of them cannot understand the depth of them."

It is the pride of the English lawyer that he has a system of law as intricate and difficult of acquisition as the law of Rome. English mediaeval law may be, as Maitland says, couched partly in bad Latin, partly in worse French; but its effort is to express its concepts in exact technical language. You will doubtless recall the story that Blackstone tells of the famous question with which Sir Thomas More, when a student on his travels, "puzzled a pragmatical professor in the university of Bruges in Flanders; who gave a universal challenge to dispute with any person in any science: . . . Upon which Mr. More sent him this question, *'Utrum averia carucae, capta in vetito namio, sint irreplegibilia?'* " Here was a practical question and it related primarily to English procedure. 3 Bl. Comm. * 148 n. v. But I have said enough in a general way about the importance of looking at our law through its procedure.

The study of actions will lead us into the middle ages. A deal of nonsense has been written about this period,—its political institutions and its law. One might think of it as a time of utter darkness; the Year Books as an example of its crabbed law. But I think Stubbs was right when he described the Middle Ages (*i. e.*, from say 1000 to 1500) as a great age of legal growth,—a time when

"the idea of right as embodied in law, was the leading idea of statesmen, and the idea of rights justified or justifiable by the letter of the law was a profound influence with politicians. . . . The scholastic philosophy was an attempt to codify all existing knowledge under laws or formulae analogous to the general principles of justice."

In no time in the whole of history did law occupy so predominant a place in men's minds. Men felt that they must have law on their side. Wars of course there were: wars of conquest. But always was a legal claim alleged, and it had a semblance of justice. It was not to secure a

"place in the sun" that nations invoked the arbitrament of the sword. Take the Norman Conquest, which is far from the happiest example. William claims by plea of bequest, the legacy of Edward the Confessor; the papal sanction; the legal election by the *witenagemote* of the vanquished race. All these involve a concession to the public sense of right. (Stubbs paraphrased.)

Note further the anxious effort to preserve legal continuity: the Conqueror confirms the English laws; the Norman landowner steps into the exact place of the English landowner whose forfeited lands he holds. English law is not extinguished but goes on. This is but an example, and not the best. We shall be dealing not only with the period of the growth of our law, but with the time when law is the norm,—the staple analogy ever present in men's minds. That thought it is, and certain very startling movements of the present time which has led me to propose as the first topic for our consideration the evolution of the idea of the supremacy of law. Let me give you in veriest skeleton my scheme of topics:

1. Supremacy of law. Meaning presently explained. The concept underlies our whole legal system and serves as an appropriate introduction.

2. Evolution of the forms of action: their influence upon the formation of our substantive law.

3. *Slade's Case. Indebitatus assumpsit* superceding debt. The origin of assumpsit and its relation to consideration. *Indebitatus* and its effects. Quasi-contract and contract.

4. *Coggs* v. *Bernard.* The use of Roman Law. How much?

5. Law Merchant and Common Law. Incidentally of Lord Mansfield and his influence, particularly in America.

You may say these topics are isolated and bear no necessary relation to each other. True. We begin with a problem of public or quasi-public law. We turn then to certain specific problems in private law. But the field of legal history is so vast that one must give either a sketchy, and to my notion worthless, picture of the whole,—or else confine oneself to particulars. But throughout, the method we shall employ is the same. Let us begin with some situation in modern law that seems to demand explanation. We can, I hope, plant our feet firmly by beginning with that with which we are familiar. Let us then go backward into origins. And if I am fortunate I may perhaps show to you how a grasp of the forms of action opens wide the whole field of the common law; for for me this holds the heart of the matter.